(9) (10)

Supreme Court, U.S.
FILED
OCT 3 2002
CLERK

Nos. 01-593 and 01-594

In the Supreme Court of the United States

DOLE FOOD CO., ET AL., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

DEAD SEA BROMINE CO., LTD. AND BROMINE COMPOUNDS LTD., PETITIONERS

v.

GERARDO DENNIS PATRICKSON, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENTS

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QUESTIONS PRESENTED

The Foreign Sovereign Immunities Act of 1976 (FSIA) defines an "agency or instrumentality of a foreign state" as an entity that is (among other requirements) a separate legal person, such as a corporation, "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). This case presents two questions concerning the interpretation of that phrase:

1. Whether a corporation is an "agency or instrumentality" if a foreign state owns a majority of the shares of a corporate enterprise that in turn owns a majority of the shares of the corporation.

2. Whether a corporation is an "agency or instrumentality" if a foreign state owned a majority of the shares of the corporation at the time of the events giving rise to litigation, but the foreign state does not own a majority of those shares at the time that a plaintiff commences a suit against the corporation.

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INTEREST OF THE UNITED STATES

The United States has a substantial interest in the proper construction of the Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. 1602 *et seq.*, which presents the sole basis for civil litigants to obtain jurisdiction over a foreign state in United States courts. The FSIA prescribes the scope of foreign sovereign immunity in light of objective criteria that reflect international legal principles and the United States' national interests, thereby reducing the possibility of international friction concerning determinations of judicial jurisdiction over foreign nations. Properly construed, the FSIA provides reasonably concise and clear rules

for foreign states, litigants, and courts to determine whether a foreign state may be sued. The United States therefore has a significant stake in its correct application and has consistently participated in cases before this Court construing its terms. See, *e.g.*, *Saudi Arabia* v. *Nelson*, 507 U.S. 349 (1993); *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607 (1992). At the Court's invitation, the Solicitor General filed an amicus brief on behalf of the United States at the petition stage of this case.

STATEMENT

This case arises from a toxic-tort civil action in which foreign farm workers brought suit in Hawaii state court against various fruit and chemical companies to recover damages for injuries allegedly resulting from the overseas use of the pesticide dibromochloropropane (DBCP). The original defendants impleaded two additional companies, which in turn sought to remove the case to federal district court. The impleaded companies argued, among other things, that each was an "agency or instrumentality" of a foreign state within the meaning of the Foreign Sovereign Immunities Act of 1976, and was therefore itself a foreign state for purposes of the FSIA. The district court rejected that argument, but allowed removal on other grounds not at issue here. The court of appeals reversed the federal district court's order allowing removal, holding, among other things, that the impleaded companies are not agencies or instrumentalities of a foreign state for purposes of the FSIA. Pet. App. 1a-23a.[1]

1. The FSIA provides "the sole basis for obtaining jurisdiction over a foreign state in our courts," whether state or federal. *Argentine Republic* v. *Amerada Hess Shipping Corp.*, 488 U.S. 428, 434 (1989). It prescribes "when and how

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[1] Citations to "Pet. App." refer to the petition appendix in No. 01-593 (the Dole petition).

parties can maintain a lawsuit against a foreign state or its entities in the courts of the United States and * * * when a foreign state is entitled to sovereign immunity." H.R. Rep. No. 1487, 94th Cong., 2d Sess. 6 (1976). The FSIA includes definitions setting out the meaning of its operative terms, including the definition of a "foreign state" and an "agency or instrumentality" of a foreign state. 28 U.S.C. 1603.

Section 1603(a) provides that, except for purposes of Section 1608 (which addresses service of process on a foreign state), a "foreign state" includes a "political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." 28 U.S.C. 1603(a). Subsection (b) of Section 1603 provides:

An 'agency or instrumentality of a foreign state' means any entity—

> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

28 U.S.C. 1603(b). By virtue of a specific provision of the federal removal statute, 28 U.S.C. 1441(d), applicable to suits against a "foreign state" as defined in 28 U.S.C. 1603(a), the FSIA also "guarantees foreign states the right to remove any civil action from a state court to a federal court." *Verlinden B.V.* v. *Central Bank of Nigeria*, 461 U.S. 480, 489 (1983) (citing 28 U.S.C. 1441(d)).

2. Respondents brought suit against the petitioners in No. 01-593 (the Dole petitioners) alleging that the com-

panies' overseas use of DBCP caused adverse health effects. The Dole petitioners impleaded the petitioners in No. 01-594 (the Dead Sea Companies), which allegedly supplied some of the DBCP used on the fruit farms. The Dead Sea Companies consist of two companies incorporated in Israel, Dead Sea Bromine Company (DSB) and Bromine Compounds Limited (BCL).

At all times relevant to this case, the State of Israel has owned at least some shares of the Dead Sea Companies' corporate parents. During a significant part of the period that respondents allege exposure to DBCP—from 1975 to 1985—the State of Israel owned all of the shares of Israel Chemicals Limited, which owned a large majority of the shares in Dead Sea Works Limited, which in turn owned a majority of the shares in DSB. See Dole Br. Add. 3a. During that same period, Dead Sea Works and DSB, individually or collectively, owned a large majority of the shares of BCL. *Id.* at 4a. In the 1990s, the State of Israel began to divest its interest in Israel Chemicals Limited. When this lawsuit was filed in 1997, the State of Israel owned approximately 32% of that company's shares, one of DSB's shares, and one of BCL's shares. See Dead Sea Br. 7.

The Dole petitioners and the Dead Sea Companies defended removal of this lawsuit to federal district court on three rationales. First, the Dole petitioners claimed that, under federal common law, federal jurisdiction exists as to any case raising important foreign relations concerns. Second, the Dead Sea Companies argued that each of them was an "organ of a foreign state," and therefore an "agency or instrumentality of a foreign state" within the meaning of 28 U.S.C. 1603(b)(2). Third, the Dead Sea Companies argued that Israel "owned" a majority of the Dead Sea Companies' "shares or other ownership interest" and that each was an "agency or instrumentality of a foreign state" on that basis. *Ibid.* The district court rejected petitioners' FSIA argu-

ments, Pet.-App. 33a-45a, but retained jurisdiction based on the federal common law of foreign relations, *id.* at 46a-49a. The district court then dismissed the lawsuit on *forum non conveniens* grounds. *Id.* at 51a-75a.

3. The court of appeals reversed and ordered that the case be remanded to Hawaii state court. The court rejected petitioners' claim that federal jurisdiction is appropriate because "this case implicates the 'uniquely federal' interest in foreign relations." Pet. App. 9a. It observed that state courts apply federal law in a wide variety of contexts, subject to this Court's review. *Id.* at 12a. The court of appeals found "no reason to treat the federal common law of foreign relations any differently," noting that Congress has not "extend[ed] federal-question jurisdiction to all suits where the federal common law of foreign relations might arise as an issue." *Id.* at 12a-13a.

The court of appeals also found no basis for federal jurisdiction under the FSIA's provision that defines an agency or instrumentality of a foreign state to include an "organ of a foreign state." 28 U.S.C. 1603(b)(2). "In defining whether an entity is an organ, courts consider whether the entity engages in a public activity on behalf of the foreign government." Pet. App. 21a. Here, the court explained, "[a]lthough Israeli law granted [substantial oversight authority] directly to the Israeli government, it is not considerably different from the control a majority shareholder would enjoy under American corporate law. * * * [T]he Dead Sea Companies were not run by government appointees; their employees were not treated as civil servants; nor were the Companies wholly owned by the government of Israel. * * * Nor did the Companies exercise any regulatory authority." *Id.* at 22a. The court therefore determined that the Dead Sea Companies are not entitled to organ status because they are "independent commercial enterprises, heavily regulated, but

acting to maximize profits rather than pursue public objectives." *Id.* at 22a-23a.

Of direct relevance here, the court of appeals concluded that Israel did not own a "majority of [the] shares or other ownership interest" in the Dead Sea Companies. 28 U.S.C. 1603(b)(2). The court initially questioned whether the FSIA applies to a corporation in which a foreign state no longer owns the majority of the shares at the time the lawsuit is filed. Pet. App. 16a-19a. But the court "assume[d]" for purposes of this case that "the FSIA would grant federal jurisdiction over an entity that at the time of the tortious conduct was—but no longer is—a government instrumentality." *Id.* at 19a. The court of appeals then concluded, based on its earlier decision in *Gates* v. *Victor Fine Foods*, 54 F.3d 1457 (9th Cir.), cert. denied, 516 U.S. 869 (1995), that the Dead Sea Companies were not instrumentalities of a foreign state. *Gates* held that the FSIA's definition of an instrumentality includes a corporation whose shares are actually owned by a foreign state, but does not include the subsidiaries of that corporation. See Pet. App. 19a. The court of appeals concluded that *Gates*' reasoning controls this case because, although Israel owned a majority of shares of Israel Chemicals Limited, Israel did not itself own a majority of the shares of that company's subsidiaries. *Id.* at 19a-21a.

SUMMARY OF ARGUMENT

I. The Dead Sea Companies are not agencies or instrumentalities of a foreign state within the meaning of the FSIA because neither company is a corporation "a majority of whose shares or other ownership interest is owned by a foreign state." 28 U.S.C. 1603(b)(2). A foreign state owns a majority of the shares of a corporation only if the foreign state itself actually owns those shares. A foreign state's ownership of a majority of shares of a parent corporation that in turn owns the shares in question will not suffice. Under "bedrock" principles of corporate law, the foreign

state, the parent corporation, and its subsidiary are separate entities. The foreign state's ownership of the parent corporation's shares may give it effective control over the parent corporation and its subsidiary, but the foreign state does not, as a matter of law, own the parent corporation's shares of the subsidiary. Journalists, lawyers, and even courts might sometimes colloquially describe the owner of a corporation as the owner of a corporate subsidiary. But the FSIA is a law, not a manner of speaking, and it accordingly should be interpreted in light of the legal meaning of its terms. When Congress wishes a statute to sweep more broadly than the legal meaning of ownership would reach, it expresses that intent through appropriate terminology.

The FSIA's purpose and legislative history provide no basis for courts to depart from the plain meaning of the words that Congress chose. The FSIA's ownership requirement, read in light of its legal meaning, poses little risk of serious foreign relations friction because it provides foreign states with a more generous measure of protection than other nations typically provide. If this Court nevertheless were to expand the coverage of the FSIA beyond the limits that the separate entity principle establishes, the Court would also need to create a new rule, without congressional guidance, for determining how far to extend the concept of "indirect" ownership that petitioners urge. The FSIA's legislative history provides no suggestion that Congress intended that course. Nor, contrary to petitioners' assertions, did Congress manifest any intention to grant immunities to foreign states comparable to those possessed by domestic government-owned corporations, which in any event frequently have no sovereign immunity.

II. Under any view of the FSIA's "ownership" requirement, the State of Israel did not own a majority of the shares of the Dead Sea Companies at the time this suit was filed. A foreign state owns a majority of the shares of a corporation

for purposes of satisfying the FSIA's threshold requirement for subject matter jurisdiction only if it owns those shares at the time of the lawsuit. The FSIA expressly requires present ownership, and, because the relevant provisions establish a condition for jurisdiction, a corporation must establish that it satisfies the FSIA's ownership requirement at the time that the lawsuit is filed. Congress had no compelling reason to make available the FSIA's special procedural provisions governing an "agency or instrumentality of a foreign state" to a corporation that no longer possesses the sovereign attribute—majority ownership by a foreign state—that distinguishes that entity from other corporations.

Contrary to petitioners' contentions, this Court's recognition of domestic immunities that protect the President, legislators, judges, and others, from suits arising from their "official acts," provides no basis for a different result. Unlike foreign sovereign immunity, those domestic immunities are not the product of the express terms of a jurisdictional statute, and they implicate entirely different policies and concerns. Petitioners' reliance on *The Western Maid*, 257 U.S. 419 (1922), an 80-year-old admiralty decision, is similarly misplaced. The Court's conclusion in that case, that Congress's retention of federal maritime immunity precluded the creation of a private in rem cause of action against vessels once they passed into private hands, likewise implicates different legal principles, policies, and concerns. Finally, petitioners are wrong in suggesting that the FSIA's goal of avoiding foreign friction provides a basis for departing from the FSIA's terms. A foreign state's attenuated interest in a corporation that it formerly owned does not provide a sufficient basis for disregarding the FSIA's text and treating the corporation as if it retained the status that the foreign state itself has terminated.

ARGUMENT

THE DEAD SEA COMPANIES ARE NOT AGENCIES OR INSTRUMENTALITIES OF A FOREIGN STATE FOR PURPOSES OF THE FOREIGN SOVEREIGN IMMUNITIES ACT

The FSIA provides that a corporation is an "agency or instrumentality of a foreign state" if, among other requirements, "a majority of [the corporation's] shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b). Petitioners urge that the Dead Sea Companies—DSB and BCL—each qualify as an "agency or instrumentality" because the State of Israel, before the initiation of this suit, had an indirect interest in those companies. Specifically, from 1975 to 1985, Israel owned a majority of the shares of Israel Chemicals Limited, which in turn owned a majority of the shares of Dead Sea Works, which in turn owned a majority of shares of DSB, which in turn owned a majority of the shares of BCL. Contrary to petitioners' submission, Israel's interest is too attenuated to satisfy the FSIA's definition, which requires that the foreign state itself own a majority of DSB's or BCL's shares. Israel has never actually owned a majority of the shares of either of the Dead Sea Companies. But in any event, Israel's past ownership of a majority of the shares of even the parent corporations of DSB and BCL terminated before the initiation of this suit. That past ownership interest does not provide a continuing basis for treating either DSB or BCL as "an agency or instrumentality of a foreign state"—and hence as a "foreign state" in its own right under the FSIA—that could remove this suit to federal court.

I. A Foreign State's Ownership Of A Majority Of The Shares Of A Corporate Entity Does Not Confer "Agency Or Instrumentality" Status On The Subsidiaries Of That Entity

A. The Plain Terms Of The FSIA's Majority Ownership Provision Embrace Only Those Entities The Majority Of Whose Shares Or Other Ownership Interest Is Actually Owned *By The Foreign State*

The "starting point for interpreting a statute is the language of the statute itself." *E.g.*, *Hallstrom* v. *Tillamook County*, 493 U.S. 20, 25 (1989). The key language of the FSIA is contained in Section 1603(b)(2), which confers "agency or instrumentality status" on a corporation "a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof." 28 U.S.C. 1603(b)(2). Under the familiar legal concept that a parent corporation and its subsidiaries are separate entities, a foreign state "owns" a majority of the shares of a corporation only if the foreign state itself actually owns those shares.

1. As this Court has recognized, "incorporation's basic purpose is to create a distinct legal entity." *Cedric Kushner Promotions, Ltd.* v. *King*, 533 U.S. 158, 163 (2001). Thus, when a foreign state creates a corporation, the law recognizes that the foreign state and the corporation are, as a matter of law, separate persons. See *First Nat'l City Bank* v. *Banco Para El Comercio Exterior De Cuba*, 462 U.S. 611, 626-627 (1983) ("[G]overnment instrumentalities established as juridical entities distinct and independent from their sovereign should normally be treated as such."). Likewise, when that corporation creates a subsidiary, "the parent corporation and its subsidiary are treated as separate and distinct legal persons even though the parent owns all the shares in the subsidiary and the two enterprises have identical directors and officers." Harry Henn & John Alexander, *Laws of Corporations* § 148, at 355 (1983) (Henn &

Alexander). See *Burnet* v. *Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities.").[2]

The foreign state's ownership of the parent corporation's shares may enable it to control that corporation's activities, and the parent corporation's ownership of the subsidiary may enable it to control the subsidiary's activities. See, *e.g.*, *United States* v. *Bestfoods*, 524 U.S. 51, 61-62 (1998) (a "parent corporation" exercises "control through ownership of [the subsidiary] corporation's stock"). The combined effect of such a tiered arrangement may enable the foreign state to exercise effective control over the subsidiary. Nevertheless, the foreign state does not, in the legal sense, *own* the shares of the subsidiary. Rather, it is the parent corporation that owns those shares as one of its corporate

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[2] Petitioners incorrectly contend that "the FSIA explicitly rejects the principle of corporate separation in the definition of an agency or instrumentality." Dole Br. 34. Section 1603(b) expressly grants the FSIA's protections to certain categories of "separate legal person[s]"—those that are "organ[s]" of the foreign state and those that satisfy the majority ownership requirement. See 28 U.S.C. 1603(b)(1)-(2). Thus, by its very terms, Section 1603(b) of the FSIA recognizes and employs the separate entity concept. The FSIA's provision for attachment remedies, 28 U.S.C. 1610, further illustrates that Congress was aware of principles of separate corporate ownership. That provision separately addresses attachment of the "property * * * of a foreign state" generally, 28 U.S.C. 1610(a), and the "property * * * of an agency or instrumentality of a foreign state" in particular, 28 U.S.C. 1610(b). It limits attachment of the latter type of property to situations involving claims against the particular agency or instrumentality that owns it. 28 U.S.C. 1610(b)(2). As a result, "Section 1610(b) will not permit execution against the property of one agency or instrumentality to satisfy a judgment against another, unrelated agency or instrumentality. There are compelling reasons for this. If U.S. law did not respect the separate juridical identities of different agencies or instrumentalities, it might encourage foreign jurisdictions to disregard the juridical divisions between different U.S. corporations or between a U.S. corporation and its independent subsidiary." H.R. Rep. No. 1487, *supra*, at 29-30 (citation omitted).

assets. See, *e.g.*, 1 *Fletcher Cyclopedia of the Law of Private Corporations* § 31, at 509 (rev. perm. ed. 1999) (*Fletcher*) ("The property of the corporation is its property, and not that of the shareholders, as owners." (footnote omitted)); accord Henn & Alexander § 71, at 128-129 ("Shareholders are neither agents of the corporation * * * nor owners of the corporation's assets.").[3]

2. Petitioners primarily argue that a foreign state's ownership of the parent corporation should be equated with ownership of the parent corporation's assets because "[i]n *common parlance*, the shareholders of a corporation are frequently said to own the assets of the corporation, including the subsidiaries." Dole Br. 16 (emphasis added). See *Flink* v. *Paladini*, 279 U.S. 59, 63 (1929)(Holmes, J.) ("In common speech, the stockholders [of a corporation that

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[3] Petitioners disregard the extensive authority supporting that fundamental principle. See, *e.g.*, 1 *Fletcher* § 31, at 509-515 (collecting cases). They instead refer (Dole Br. 16; Dead Sea Br. 23) to a passage of the *Fletcher* treatise stating that "[t]he holding company *may be regarded* as the 'owner' of the subsidiary's property." 1 *Fletcher* § 43, at 733-734 (emphasis added). But the treatise emphasizes that "such results do not follow from the mere fact of stockholding." *Id.* at 734. Rather, a court may impute ownership to the holding company where the corporate form is a sham and properly disregarded. See *id.* at 733-734; see also, *e.g.*, 12B *Fletcher* § 5753, at 62 ("A parent corporation does not own the property of a subsidiary corporation, although under some circumstances it may be deemed to be the owner where it is proper to disregard the corporate entity.") (footnotes omitted); 6A *Fletcher* § 2821, at 334 ("A 'holding company' has a separate corporate existence, and is to be treated as a separate entity, unless such corporate existence is a mere sham.") (citing, *e.g.*, *Gledhill* v. *Fisher & Co.*, 262 N.W. 371, 373 (Mich. 1935) ("A stockholder in a corporation that owns another is not a stockholder in the latter.")); 1 *Fletcher* § 31, at 518 ("Under certain circumstances, * * * the corporate entity and ownership may be disregarded and the shareholder or shareholders regarded as owners; but this concedes the general rules to be as just stated."); U.S. Pet. Amicus Br. 8 n.3. No such sham or comparable circumstances are alleged here.

owned a ship] would be called owners [of the ship], recognizing that their pecuniary interest did not differ substantially from those who held shares in the ship."). The FSIA, however, is not "common parlance," but rather a law that should be interpreted in light of the legal meaning of the terms that Congress used. "Words that have acquired a specialized meaning in the legal context must be accorded their *legal* meaning." *Buckhannon Bd. & Care Home, Inc.* v. *West Virginia Dep't of Health & Human Res.*, 532 U.S. 598, 615 (2001) (Scalia, J., concurring); accord *Republic of Argentina* v. *Weltover, Inc.*, 504 U.S. 607, 613 (1992).[4]

A foreign state does not, by owning the majority of shares of a corporation, own the assets of that corporation—including that corporation's shares in a subsidiary—because the legal concept of ownership connotes basic rights to use and transfer property that the shareholders of a corporation generally do not possess. See, *e.g.*, *Black's Law Dictionary* 1131 (7th ed. 1999) ("Ownership implies the right to possess a thing, regardless of any actual or constructive control."). "Shareholders, even the controlling shareholder, cannot * * * assign the corporation's properties and rights, nor apply corporate funds to personal debts or objects, nor release a purchaser's liability to pay the price to the corporation, nor execute a bill of sale covering corporate assets." 1 *Fletcher* § 31, at 515 (footnotes omitted) (collecting cases); see 12B *Fletcher* § 5753, at 62 ("Ordinarily a shareholder cannot convey or mortgage the corporate property or transfer its goodwill or release a debt due to it."). Indeed, shareholders generally no more own corporate assets than they are liable for corporate debts. Cf. 1 *Fletcher* § 43, at 715-716 ("[U]nder ordinary circumstances, a parent corporation will

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[4] See, *e.g.*, *Field* v. *Mans*, 516 U.S. 59, 69-70 (1995); *Community for Creative Non-Violence* v. *Reid*, 490 U.S. 730, 739 (1989); *NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981); *Morissette* v. *United States*, 342 U.S. 246, 263 (1952).

not be liable for the obligations of its subsidiary.") (collecting cases).

3. Congress's understanding that a foreign state's ownership is to be measured by a legal standard, rather than a colloquial one, is confirmed by context. See, *e.g.*, *Bailey* v. *United States*, 516 U.S. 137, 145 (1995) ("[T]he meaning of statutory language, plain or not, depends on context.") (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)). Section 1603(b)(2) does not simply define an "agency or instrumentality" to include companies that a foreign state, in some colloquial sense, "owns." See Dole Br. 16-18 & nn.5-8. Rather, it defines that term as a corporation "a majority of whose *shares or other ownership interest* is *owned* by a foreign state." 28 U.S.C. 1603(b) (emphasis added). The statute's specific reference to the foreign state's ownership of "shares"—which consist of discrete, legally recognized, units of property—is most naturally understood to signify actual legal ownership of the corporation's stock rather than effective control through a tiered corporate structure.

If Congress had intended to allow the type of tiering that petitioners propose, Section 1603(b) could have easily been written to include within the definition of "agency or instrumentality" those entities "a majority of whose shares" is owned not only "by a foreign state or political subdivision thereof" but also *by another agency or instrumentality of the foreign state*. But Congress did not do so. See H.R. Rep. No. 1487, *supra*, at 15 ("Where ownership is divided between a foreign state and private interests, the entity will be deemed to be an agency or instrumentality * * * *only if* a majority of the ownership interests (shares of stock or otherwise) is owned by a *foreign state or by a foreign state's political subdivision*." (emphasis added)). Although Congress recognized that the term "political subdivision" should include "all governmental units beneath the central government, including local governments," *ibid.*, it made no similar

effort to include all tiered corporate entities beneath the corporation a majority of whose shares the foreign state or political subdivision itself owns.

To be sure, journalists, lawyers, and even courts sometimes say, as a shorthand expression, that a parent corporation "owns" stock held by a subsidiary, equating ownership with the control that may arise through the subsidiary form. See, *e.g.*, Dole Br. 17 nn.5-8. But when Congress enacts a law, it generally exercises greater care and explicitly so provides when it intends that law to embrace both a parent corporation and its subsidiaries. For example, the Newspaper Preservation Act's definition of "newspaper owner" includes "any person who owns or controls directly, or indirectly through separate or subsidiary corporations, one or more newspaper publications." 15 U.S.C. 1802(3). Similarly explicit formulations of direct or indirect ownership or control appear throughout the United States Code. See, *e.g.*, *Barnhart* v. *Sigmon Coal Co.*, 122 S. Ct. 941, 951 (2002) (discussing coverage under the Coal Act of corporations in the same "controlled group" of corporations as mine operators).[5]

Contrary to petitioners' suggestion (Dole Br. 17 n.6), the Government Corporation Control Act of 1945, ch. 557, 59 Stat. 597, is not an exception to the rule. In the course of imposing heightened government oversight, Congress temporarily labeled forty-one government-controlled corporations as "wholly owned Government corporations," without regard to whether the listed entities were truly owned by

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[5] See also, *e.g.*, 7 U.S.C. 1a(8) (agricultural cooperative associations); 11 U.S.C. 101(2)(A) (bankruptcy affiliates); 12 U.S.C. 221a(b) (bank affiliates); 12 U.S.C. 1813(w)(4)(A) (bank subsidiaries); 12 U.S.C. 1841(a)(2)(A) (bank holding companies); 15 U.S.C. 79b(a)(7) (public holding companies); 15 U.S.C. 80a-2(a)(3)(A) (investment company affiliates); 22 U.S.C. 3102 (parent corporations in international survey). Such language clearly expresses Congress's intent to include more remote forms of affiliation. In contrast, Section 1603(b)(2) includes no reference to control, "direct or indirect" ownership, subsidiaries, or affiliates.

the government itself, or were, in fact, wholly owned subsidiaries of a wholly owned government corporation at the time—or, indeed, were corporations at all. See Act of June 30, 1945, ch. 215, 59 Stat. 310 (dissolving several entities that later appeared on the Government Corporation Control Act's list). In that instance, Congress elected to use a convenient shorthand term to describe a list of entities that were subject to the Act's terms. That shorthand term accurately described the status of most of the corporations, and there was no reason, for purposes of the Act, to distinguish corporations that were wholly owned subsidiaries of other wholly owned corporations. Congress's decision to employ an imprecise shorthand term that had no substantive consequence, in a particular instance more than 50 years ago, does not dictate the dramatic departure from convention that petitioners urge here. See generally 31 U.S.C. 9101 (providing a current definitional list of "wholly owned Government corporation[s]").[6]

4. This Court's recent decision in *United States* v. *Bestfoods* further confirms that the "separate entity" concept provides a "venerable common-law backdrop" for under-

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[6] Petitioners also rely (Dole Br. 18) on the General Accounting Office's use of similar shorthand in its *1945 Reference Manual of Government Corporations*, S. Doc. No. 86, 79th Cong., 1st Sess. (1945) (*GAO Manual*). In describing various corporate entities, the GAO sometimes referred to wholly-owned subsidiaries of wholly-owned government corporations as themselves government corporations. That usage similarly has no relevance to the issue presented here. The GAO's shorthand descriptions obviously cannot displace established understandings respecting the legal consequences of corporate form. Indeed, the *GAO Manual* also contains descriptions that accurately state the controlling concepts: "The [Warrior River Terminal] is wholly owned by the Inland Waterways Corporation, which in turn is owned by the United States." *GAO Manual* 290. That publication simply illustrates that, in the course of preparing a 526-page report, the GAO, for convenience, sometimes employed terminology that lacked legal precision.

standing the text of the FSIA. 524 U.S. at 62. In that case, the United States sought to recover its costs of responding to the release or threatened release of hazardous substances under the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA), 42 U.S.C. 9601 *et seq.*, which authorizes recovery of environmental clean-up costs from "any person who * * * *owned* or operated" a polluting facility. 42 U.S.C. 9607 (emphasis added). As the Court noted:

> It is a general principle of corporate law deeply "ingrained in our economic and legal systems" that a parent corporation * * * is not liable for the acts of its subsidiaries. * * * The Government has indeed made no claim that a corporate parent is liable as an owner or operator under [42 U.S.C. 9607] simply because its subsidiary is subject to liability for owning or operating a polluting facility.

524 U.S. at 61-62. If the United States had subscribed to petitioners' view that a parent corporation "owns" the assets of its subsidiaries, it plainly would have sought to hold a parent corporation liable as the "owner" of a subsidiary's polluting facility. Instead, the United States recognized that CERCLA, like the FSIA, reflects the bedrock principle that a parent corporation does not "own" the assets of its subsidiary.[7]

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[7] Petitioners also claim that, even if Israel did not "own" the Dead Sea Companies' "shares," it owned "a majority of" those companies' "other ownership interest." Dole Br. 21-23; Dead Sea Br. 25-28. Unlike some partnerships and joint ventures, however, the ownership interest in the Dead Sea Companies *was divided into shares*. Thus, there is no "other ownership interest" of the Dead Sea Companies at issue in this case. Cf. 11 *Fletcher* § 5081, at 35 ("Most state corporations codes as well as the Model Business Corporation Acts define 'shares' as 'the units into which the proprietary interests in a corporation are divided.'"). A different approach to ownership of "shares or other ownership interests" might be

B. Petitioners' Extra-Textual Arguments Are Unpersuasive

Petitioners contend that their construction of Section 1603(b) finds support in (1) the FSIA's goal of protecting foreign relations; (2) the FSIA's legislative history; and (3) the historical treatment of companies indirectly owned by the federal government. Those arguments are without merit.

1. Petitioners contend that their construction advances the FSIA's "primary" purpose of "minimiz[ing] the foreign relations problems that can arise from litigation involving foreign governments and affiliated entities." Dole Br. 12; see *id.* at 23-28; Dead Sea Br. 31-36. Congress made clear in its declaration of purpose, however, that the FSIA seeks to "protect the rights of both foreign states *and* litigants in United States courts." 28 U.S.C. 1602 (emphasis added). The FSIA should be construed with that balance in mind. Congress crafted Section 1603(b) to give proper respect to the competing interests of both foreign states and other litigants in United States courts.[8]

Moreover, Section 1603(b), construed in accordance with the "separate entity" principle, protects the interests of foreign states by granting them a *more generous* measure of protection than foreign states typically grant to foreign-government-owned corporations. By and large, foreign

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appropriate if the entity in question were organized under a legal system whose ownership principles do not resemble our own. See Gary Born & David Westin, *International Civil Litigation in United States Courts* 458-459 (2d ed. 1992) (collecting cases and commentary). But this is not such a case. The mere fact that Israel exercises substantial *control* over its government companies and subsidiaries (Dead Sea Br. 30 & n.11) does not indicate a different concept of corporate *ownership*.

[8] Cf. *Pension Benefit Guar. Corp.* v. *LTV Corp.*, 496 U.S. 633, 646 (1990) ("[N]o legislation pursues its purposes at all costs * * * and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.").

states do *not* grant sovereign-immunity-based protections of any kind to government-owned corporations unless the corporations are engaged in sovereign acts. See Gary Born & David Westin, *International Civil Litigation in United States Courts* 459 & nn.57-58 (2d ed. 1992).[9] Section 1603(b) similarly confers "agency or instrumentality" status on corporations engaged in sovereign acts through its provision extending that status to an "organ of a foreign state." 28 U.S.C. 1603(b)(2). *In addition*, Section 1603(b) confers that status—and the accompanying procedural protections—on corporations the majority of whose shares are actually owned by a foreign state, *whether or not* those corporations perform sovereign functions. *Ibid.* Thus, Section 1603(b), even when construed in light of "separate entity" principles, provides broader protection to the sovereign interests of foreign states than other nations ordinarily provide. Consequently, it is unlikely, as so construed, to give rise to "irritations in foreign relations" (Dole Br. 24). Israel, for example, has not joined petitioners in raising objections to the court of appeals' ruling in this case.[10]

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[9] See also, *e.g.*, William Hoffman, *The Separate Entity Rule in International Perspective: Should State Ownership of Corporate Shares Confer Sovereign Status for Immunity Purposes?*, 65 Tulane L. Rev. 535 (1991); cf. Dole Br. 36 & n.15.

[10] Although petitioners raise the specter of "foreign relations problems," Dole Br. 12, only one foreign state, the Republic of Ireland, has filed a brief amicus curiae supporting petitioners, citing concerns respecting the treatment of an Irish insurance company that was acquired by a government-owned holding company. Ireland Amicus Br. 19. As noted in the text, however, that company can expect to receive treatment under the FSIA that is no less favorable than the treatment it would be accorded in most other countries. Petitioners' additional contention (Dole Br. 26-27; Dead Sea Br. 35) that application of the separate entity doctrine would lead to arbitrary results is mistaken, particularly when measured against a foreign state's expectations. The resulting rule would simply determine ownership in conformity with the normal consequences of separate incorporation. The only anomaly would be that a foreign state would receive a

Furthermore, Section 1603(b), construed in light of the "separate entity" principle, takes due account of the interests of other litigants. It places a reasonable limit on the extent to which the protections provided by the FSIA may be expanded through the corporate form, and it does so on the basis of clear and manageable rules that rest on familiar corporate law concepts. Individuals who do business wi... foreign corporations need such rules when determining whether they are dealing with entities that may be subject to the FSIA. Under the United States' understanding of Section 1603(b), the status of a foreign entity can be determined based on whether the entity engages in sovereign activities and on whether a majority of its stock is owned by a foreign state. Under petitioners' construction, the entity's status may be hidden behind a series of corporate shells that place considerable burdens on contracting parties and litigants—as well as the courts—in determining the true legal character of the entity.

This case illustrates the potentially complex inquiries that petitioners' construction would require. See Dole Br. Add. 3a-4a (charts depicting the complicated and constantly changing corporate relationships). Furthermore, if the Court were to adopt petitioners' approach, it would be required to create a rule, without any congressional guidance, for determining *how* to measure whether a foreign state owns a "majority" of the shares of a distantly tiered entity. Petitioners suggest that the Court could adopt either a "multiplier" rule (see Dole Br. 20, 38) or an "infinite tiering" rule (*id.* at 38 & n. 17). But whether the Court adopted one of those tests, or some other test, it would thrust itself into a policy-making function that does not ordinarily reside in the Judicial Branch. Congress, which

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benefit—the extension of FSIA protections to majority-owned corporations without regard to whether they perform sovereign acts—that generally has no analogue elsewhere in the world.

regularly fields recommendations for legislative reform, is far better situated to address issues of policy respecting the FSIA. Cf. Working Group of the American Bar Ass'n, *Reforming The Foreign Sovereign Immunities Act*, 40 Colum. J. Transnat'l L. 489 (2002) (proposing legislative amendments, including amendments addressing tiered corporate relationships).

2. Petitioners' claim (Dole Br. 28-29) that the FSIA's legislative history supports their construction is baseless. The only evidence they cite (*id.* at 29) is the House Report's statement that a "mining enterprise" might qualify as an "agency or instrumentality." H.R. Rep. No. 1487, *supra*, at 15-16. Petitioners contend that the word "enterprise" necessarily denotes a multi-corporate undertaking, but plainly that is not so. See, *e.g. Webster's Third New International Dictionary* 757 (1993) (defining "enterprise" as, among other things, "a unit of economic organization or activity (as a factory, a farm, a mine); *esp.*: a business organization: FIRM, COMPANY"). The FSIA's legislative history does not discuss tiered corporate relationships. The legislative history does, however, recognize the significance and vitality of the separate entity principle. See note 2, *supra*.

3. Petitioners are wrong in suggesting that the FSIA's use of the term "owned" implicitly grants "companies indirectly owned by foreign governments the same agency-or-instrumentality status that companies indirectly owned by the federal government enjoy." Dole Br. 31. Congress did not manifest any intent to grant agencies or instrumentalities of foreign states a status equal to corporations owned by the United States. Rather, Congress made clear that "[c]laims of foreign states to immunity should henceforth be decided by courts of the United States and of the States in conformity with the principles set forth in this chapter." 28 U.S.C. 1602. See *Verlinden*, 461 U.S. at 486-489.

The FSIA, which "largely codifies the so-called restrictive theory of foreign sovereign immunity," *Weltover*, 504 U.S. at 612-613 (internal quotation marks omitted), implicates different policies than domestic sovereign immunity, and the criteria governing jurisdiction and immunity in each instance are correspondingly different. See *Verlinden*, 461 U.S. at 486 ("[F]oreign sovereign immunity is a matter of grace and comity on the part of the United States, and not a restriction imposed by the Constitution."). Compare, *e.g.*, 28 U.S.C. 1605 (FSIA exceptions to immunity), with 28 U.S.C. 2674, 2680 (Federal Tort Claims Act exceptions to immunity); see also 28 U.S.C. 1606 (allowing punitive damages against an agency or instrumentality of a foreign state). Hence, no concrete insights into the nature of the entities covered by the FSIA can be gained by comparing the scope of foreign sovereign immunity to immunities granted in the domestic context.[11]

In sum, petitioners' reliance on extra-textual sources is unavailing. Neither the FSIA's purpose nor its history supports extending its protections to subsidiaries of a foreign state's majority-owned corporations, and domestic principles of sovereign immunity have no direct bearing on the matter.

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[11] Indeed, Congress has elected, in some respects, to grant foreign "agencies or instrumentalities" broader immunities than those that Congress provides to corporations owned by the United States. See, *e.g.*, *Loeffler* v. *Frank*, 486 U.S. 549, 554-555 (1988) (noting that Congress has frequently withheld sovereign immunity from federal entities, such as the United States Postal Service, through "sue and be sued" clauses).

II. The FSIA Does Not Apply To A Foreign Corporation If The Foreign State Does Not Own A Majority Of The Corporation's Shares At The Time Of The Lawsuit

A. The Plain Terms Of The FSIA Grant Protection To Those Entities That Satisfy The FSIA's Definitional Requirements At The Time Of Suit

Even if the Dead Sea Companies could be considered agencies or instrumentalities of Israel at the time that the alleged liability arose, they were not so in 1997, when respondents filed their suit, because Israel had sold its controlling interest in their corporate parents. Because the Dead Sea Companies were no longer "foreign states" under any conception of the FSIA's majority ownership requirement, they were not entitled to invoke the provision of the federal removal statute applicable to a "foreign state," 28 U.S.C. 1441(d).

1. The FSIA prescribes the extent to which a "foreign state," including an "agency or instrumentality," shall be subject to "the jurisdiction of the courts of the United States and of the States." 28 U.S.C. 1604; see 28 U.S.C. 1330, 1441(d), 1605-1607.[12] Because the FSIA is a jurisdictional statute, a corporation that seeks to invoke its provisions must establish that it qualifies as an "agency or instrumentality" at the time the action is filed. See *Freeport-McMoRAN Inc.* v. *K N Energy, Inc.*, 498 U.S. 426, 428 (1991) (per curiam); see *Smith* v. *Sperling*, 354 U.S. 91, 93 n.1 (1957); *Anderson* v. *Watt*, 138 U.S. 694, 702-703 (1891). As Chief Justice Marshall explained nearly two centuries ago:

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[12] Chapter 97 of Title 28 (28 U.S.C. 1602-1611) is entitled "*Jurisdictional* Immunities of Foreign States" (emphasis added), and the corresponding provisions in 28 U.S.C. 1330 and 1441(d) govern the original and removal jurisdiction of the federal district courts over suits brought against foreign states.

> It is quite clear, that the jurisdiction of the Court depends upon the state of things at the time of the action brought, and that after vesting, it cannot be ousted by subsequent events.

Mollan v. *Torrance*, 22 U.S. (9 Wheat.) 537, 539 (1824); accord *Conolly* v. *Taylor*, 27 U.S. (2 Pet.) 556, 565 (1829).

Congress drafted the FSIA's definitional provisions against the backdrop of that hornbook principle governing jurisdictional statutes. It unambiguously defined an "agency or instrumentality" to include a corporation "a majority of whose shares or other ownership interest *is* owned by a foreign state." 28 U.S.C. 1603(b)(2) (emphasis added). That definition clearly expresses the understanding that an entity qualifies as an "agency or instrumentality" based on the foreign state's current ownership of its shares and that the entity's status as an "agency or instrumentality" may be lost through the foreign state's divestiture of its ownership interest. The FSIA's express direction that an entity qualifies as an "agency or instrumentality" only if a majority of its shares currently "is owned" by a foreign state must be understood to require majority ownership at the time that is relevant for purposes of applying the particular provisions of the FSIA at issue—in this instance, the provisions governing the filing of suits in (or removal of suits to) federal district court.[13]

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[13] Petitioners note that, "[a]s a purely grammatical matter, the present tense can be used to express matters that do not refer specifically to the present but are general timeless statements." Dole Br. 40; see Dead Sea Br. 42 (internal quotation marks omitted). But whatever the general value of that statement in interpreting statutory provisions, including other provisions of the FSIA, Dole Br. 41-42, Dead Sea Br. 42-43, it is inapposite here. The FSIA explicitly circumscribes a party's invocation of judicial authority based on that party's satisfaction of a present condition—majority ownership by a foreign state. The satisfaction of that specific jurisdictional condition "is governed by that condition, as it was at the commencement of the suit." *Conolly*, 27 U.S. (2 Pet.) at 565; see

2. The FSIA's requirement that majority ownership must be demonstrated at the time of suit is no different in principle than the requirement that diversity of citizenship, or other jurisdictional requirements pertaining to the character of the lawsuit, must be demonstrated at that time. See, *e.g.*, 28 U.S.C. 1332. The fundamental question in each case is one of subject matter jurisdiction—whether the dispute is an appropriate one for a federal court to decide. Congress has quite sensibly determined that the scope of the federal court's subject matter jurisdiction over foreign states, including their agencies and instrumentalities, should depend on the status of the parties at the time of suit. Congress had no reason to make available the FSIA's special provisions governing an "agency or instrumentality" to a corporation that no longer possesses the sovereign attribute —ownership by a foreign state—that distinguishes that entity from other corporations.

B. Petitioners' Extra-Textual Arguments Are Unpersuasive

Petitioners dispute the significance of the plain text of the FSIA and the background rules for interpreting grants of subject matter jurisdiction. Dole Br. 40-42; Dead Sea Br. 41-43. Rather, in arguing that a former "agency or instrumentality" of a foreign state may invoke the FSIA's protections, petitioners rely primarily on (1) domestic immunity principles; (2) an 80-year-old in rem admiralty case; and (3) the purposes of the FSIA. Those sources do not support petitioners' position.

1. Petitioners would have the Court take guidance from cases, such as *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982), in

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Mollan, 22 U.S. (9 Wheat.) at 539. In other situations, such as where application of an exception to foreign sovereign immunity depends on the nature of past conduct or events (see, *e.g.*, 28 U.S.C. 1605(a)(6) and (7)), a court may find that examination of the conditions at the time of the past conduct or events is appropriate.

which the Court has recognized that former government officials are entitled to immunity from liability for actions taken in their official capacity. See Dole Br. 44; Dead Sea Br. 46-47. Petitioners overlook that those cases do not involve congressional determinations respecting the scope of subject matter jurisdiction. Instead, those cases involve the distinct situation of "judicial recognition of immunity from suits *arising from official acts*." *Nixon*, 457 U.S. at 745 (emphasis added).

The Court explicitly held in *Nixon* that "petitioner, as a former President of the United States, is entitled to absolute immunity from damages liability predicated on his official acts." 457 U.S. at 749. The Court did not derive that immunity from application of the express terms of a jurisdictional statute, but rather as "a functionally mandated incident of the President's unique office, rooted in the constitutional tradition of the separation of powers and supported by our history." *Ibid.* The other species of immunity that petitioners cite (Dole Br. 44), including legislative, judicial, and prosecutorial immunity, have similar functional underpinnings and are similarly inapposite to the case at hand. See *Nixon*, 457 U.S. at 748 (describing the development of those doctrines). Assuming that international law might provide a basis for claiming analogous functional immunities based on past conduct by a *non*-natural person that has lost its sovereign status, such as a former organ of a foreign state, petitioners do not claim that they engaged in any comparable official acts here.

2. Petitioners also place great stock (Dole Br. 43; Dead Sea Br. 46) in *The Western Maid*, 257 U.S. 419 (1922), an 80-year-old admiralty case. That decision is also inapposite. In *The Western Maid*, the Court addressed whether a federal court could entertain in rem admiralty actions against three ships on account of collisions that occurred while the ships were employed by the United States in wartime service.

Two were privately owned vessels that the government had temporarily chartered for military needs. The Court concluded that neither Section 9 of the Shipping Act, 1916, ch. 451, 39 Stat. 728, nor Section 4 of the Suits in Admiralty Act, ch. 95, 41 Stat. 525, nor any act predating those statutes, subjected the United States or the ships to liability for damages caused by the ships while they were in government service. 257 U.S. at 431. The Court also recognized, however, that general maritime law would subject a ship in private service to in rem liability if it caused a collision. It therefore addressed the question "whether a liability attached to the ships which although dormant while the United States was in possession became enforcible as soon as the vessels came into hands that could be sued." *Id.* at 432.

The Court rejected that theory of liability, noting that general maritime law has force only to the extent it has "been accepted and adopted by the United States." 257 U.S. at 432. The Court stated:

> The United States has not consented to be sued for torts, and therefore it cannot be said that in a legal sense the United States has been guilty of a tort. For a tort is a tort in a legal sense only because the law has made it so. If then we imagine the sovereign power announcing the system of its laws in a single voice it is hard to conceive it as declaring that while it does not recognize the possibility of its acts being a legal wrong and while its immunity from such an imputation of course extends to its property, * * * yet if that property passes into other hands, perhaps of an innocent purchaser, it may be seized upon a claim that had no existence before.

Id. at 433. Although expressed in somewhat archaic terms, the Court's ratio decidendi is clear. The Court concluded that, because the United States had declined to create a *cause of action* or *substantive liability* in tort for the collision while the vessel was in government service, the courts

should not recognize a general maritime in rem cause of action, arising out of the same incident, that would run against subsequent owners. That holding, which addresses whether the courts were justified in recognizing a maritime cause of action under the facts of that case, has no relevance to the question of subject matter jurisdiction presented here.[14]

3. Petitioners also contend that the FSIA's "goal of protecting foreign relations" supports extending the FSIA's protections to a corporation that once was, but is no longer, an "agency or instrumentality of a foreign state." Dole Br. 45-46; see Dead Sea Br. 43-45. The FSIA seeks to protect, however, the *present* sovereign interests of foreign states (including their agencies and instrumentalities) when they are subjected to suit in United States courts, and not to regulate questions of procedure and substantive liability respecting private corporations that once were, but no longer are, owned by foreign states. The FSIA left those questions to other sources of law. See, *e.g.*, *W.S. Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400 (1990) (discussing act of state doctrine).

In any event, as previously noted, the FSIA, like other statutes, does not pursue a single objective to the exclusion of others, but instead strikes a balance between the competing interests of foreign states and other litigants. The foreign state's interests in a suit against a *former* majority-owned corporation are likely to be even more attenuated than the foreign state's interests in a current subsidiary of a majority-owned corporation. Those interests do not provide a sufficient basis for rejecting the clear import of the statutory text and treating the corporation as if it retained a former status that the foreign state itself has terminated.

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[14] As an historical note, "[t]he United States today would be subject to suit on the facts of *The Western Maid* under the Public Vessels Act." *Calmar S.S. Corp.* v. *United States*, 345 U.S. 446, 454 (1953).

If the foreign state has divested all of its stock in the entity, or reduced its ownership from a majority to a minority stake, by the time of suit, then the foreign state's interests generally would not be substantially different than would be the case if the foreign state had never acquired the stock, or never had more than a minority stake, in the corporation. The FSIA's protections are plainly not available in the latter context. There is no persuasive reason why the corporation should benefit from the FSIA's protections simply because the foreign state previously had, but no longer has, a majority ownership interest in the corporation.[15]

As the court of appeals correctly recognized, once a foreign state has eliminated its majority ownership interest in a corporation, any "affront" to the foreign state arising from litigation against that corporation is likely to be "remote and indirect." Pet. App. 19a. It would, moreover, not be the sort of affront to which the FSIA is addressed—namely, that which may arise as a result of subjecting a foreign sovereign, as such, to the jurisdiction of United States courts without suitable protections. Indeed, despite petitioners' predictions that such litigation will cause "affronts to foreign sovereigns," Dole Br. 47, the United States has not encountered "diplomatic friction" arising from post-privatization litigation.[16]

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[15] A foreign state has a general interest, of course, in fair treatment of its citizens or subjects, including its corporations, in the courts of other nations. But the United States provides substantial protections to those foreign citizens or subjects apart from the FSIA. Significantly, one of the FSIA's most important procedural protections—access to a federal forum—will often be available to a newly privatized corporation through the provision of foreign diversity jurisdiction. See 28 U.S.C. 1441(a); see generally *JPMorgan Chase Bank* v. *Traffic Stream (BVI) Infrastructure Ltd.*, 122 S. Ct. 2054 (2002).

[16] It is conceivable that a foreign state could be concerned that a newly private corporation may potentially face liabilities for past conduct during the period of foreign state ownership. But as petitioners themselves rec-

At bottom, if this Court were to accept petitioners' view that former majority-owned corporations are entitled to invoke the FSIA, the primary consequence may be simply to encourage private corporations that are no longer "agencies or instrumentalities" of a foreign state to seek strategic advantage in litigation (here, a federal rule of *forum non conveniens* that has no relation to the policies of the FSIA) by demanding the special procedures that the FSIA reserves for foreign sovereigns themselves. That consequence would undermine Congress's basic goal of providing foreign states with a measure of immunity that "would serve the interests of justice and would protect the rights of both foreign states and litigants in United States courts." 28 U.S.C. 1602.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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ognize, majority-owned corporations that engage in commercial activities are likely to be subject to liability for their activities in the United States under the FSIA's commercial activity exception. For those organizations, privatization will not result in new liabilities. See Dole Br. 28, 47. To the extent that new potential liabilities truly exist and would not expire through the application of statutes of limitation or be barred by substantive rules of liability, the foreign state can conceivably address the potential financial burdens in the course of privatization using mechanisms, such as insurance, that enterprises routinely employ when they anticipate the possibility of new liabilities. If the foreign state fails to address those liabilities, they will likely be reflected in the price that private purchasers are willing pay to acquire the corporation.

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OCTOBER 2002